

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC 20591

Served: August 16, 1990

FAA Order No. 90-22

In the Matter of:

USAIR, INC.

Docket No. CP89WP0497

ORDER

Respondent USAir Inc. ("Respondent") has filed a "Petition to Reconsider" an Order Assessing Civil Penalty which was issued without a hearing due to Respondent's failure to timely respond to the Notice of Proposed Civil Penalty (NPCP). The agency attorney has moved to dismiss Respondent's Petition on the grounds that the agency's procedural rules (14 C.F.R. §13.16 and part 13, subpart G) do not provide for such a petition, and that, in any event, the Order Assessing Civil Penalty was properly issued. The Department of Transportation Office of Administrative Law Judges declined to take cognizance of this dispute because there had been no request for a hearing, and referred it to the FAA for disposition by the Administrator. As further explained below, I have determined that the Order Assessing Civil Penalty shall be withdrawn. Whether a new NPCP should be issued is a matter within the discretion of the agency attorney. However, any further proceedings against respondent shall be in accordance with the new procedural rules applicable to FAA civil penalty actions (55 Fed. Reg. 27574 (July 3, 1990) (to be codified at 14 C.F.R. §13.16 and part 13, subpart G)).

A summary of the procedural history of this case will be helpful to an understanding of this decision. On October 19, 1989, an agency attorney in the FAA's Western-Pacific Region issued to Respondent a NPCP proposing to assess a \$10,000 civil penalty based on Respondent's alleged operation of a Boeing 737 aircraft with an improperly deferred maintenance discrepancy. The NPCP stated that, unless Respondent elected to proceed in accordance with one of several options (including requesting an informal conference, or requesting a hearing under 14 C.F.R. part 13, subpart G) within 30 days of receipt of the NPCP, an Order Assessing Civil Penalty would be issued.^{1/} Respondent received the NPCP on October 23, 1989. On December 1, 1989, thirty-nine days after Respondent's receipt of the NPCP, the agency attorney issued an order assessing a \$10,000 civil penalty, from which no appeal was available under the Rules of Practice. Respondent's request for an informal conference, also dated December 1, 1989, was received by the agency attorney on December 4, 1989.

On January 5, 1990, Respondent submitted a "Petition to Reconsider" the Order Assessing Civil Penalty, arguing that its delay in responding to the NPCP was due to the agency's improper service of that document, and that the Order Assessing

^{1/} At the time the NPCP was issued, 14 C.F.R. §13.16(j)(2) provided that in FAA civil penalty actions "an order assessing civil penalty shall be issued if the person charged with a violation . . . [d]oes not respond in a timely manner to the notice of proposed civil penalty". Section 13.16(e) required that an appropriate response be made within 30 days after receipt of a NPCP.

Civil Penalty should be withdrawn. Respondent noted that, despite the agency's earlier correspondence with certain named officials in Respondent's Pittsburgh, Pennsylvania, office regarding this alleged violation, the NPCP was not sent to any particular individual, but was simply directed to "USAir," at its corporate offices in Arlington, Virginia. (The record in this case reveals that a letter of investigation dated August 23, 1989, was sent to the Respondent's Senior Vice President for Technical Operations in Pittsburgh, and the response to that letter was written by Respondent's Senior Director of Airworthiness and FAA/Industry Affairs, also in the Pittsburgh Office.) Respondent also cited 14 C.F.R. §302.8(c), which states that in DOT economic proceedings, service may be made upon the president or other officer of a corporation or company which is a party.

On January 25, 1990, the agency attorney submitted a Motion to Dismiss Respondent's Petition for Reconsideration, noting that the Rules of Practice provide for petitions for reconsideration only of a decision or order of the FAA decisionmaker, and no such reconsideration is available from Orders Assessing Civil Penalty. The agency attorney argued that 14 C.F.R. §302.8 does not apply to this proceeding, and that service of the NPCP was proper under the procedural rules for FAA civil penalty actions in effect at that time (14 C.F.R. §13.16 and part 13, subpart G). (Those rules did not specify any particular individual to be served where the respondent is a corporate entity.) The agency attorney further argued that

Respondent had shown no good cause for its failure to timely respond to the NPCP, and that the Order Assessing Civil Penalty was properly issued. By an Answer dated February 2, 1990, Respondent opposed the agency attorney's Motion to Dismiss, maintaining that the agency's service of the NPCP violated common principles of effective service, and therefore Respondent should have been allowed extra time to respond.

On April 13, 1990, the United States Court of Appeals for the District of Columbia held that the procedural rules in effect at the time of the above-described events were invalid because they had been promulgated without prior notice and comment. Air Transport Association of America v. Department of Transportation, 900 F.2d 369 (D.C. Cir. 1990). In that case, the court barred the FAA from initiating new cases, or prosecuting pending cases, until the procedural rules were re-promulgated with notice and comment. Id. at 380. The court also stated that the FAA was free to hold pending actions in abeyance while it engaged in further rulemaking. Id. However, the court noted that a respondent in such a case would "be free to raise the defense that the FAA could not have successfully prosecuted him but for the agency's reliance on some aspect of the . . . Rules abandoned in the new scheme." Id. at 380-81.

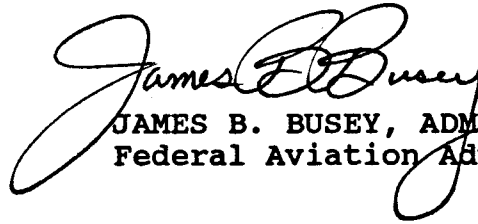
As a result of the ensuing revision and re-promulgation of the procedural rules (which had already been initiated before the court's decision)^{2/}, the initiation procedures at issue

2/ See, 55 Fed. Reg. 7980 (March 6, 1990); 55 Fed. Reg. 15110 and 15134 (April 20, 1990); 55 Fed. Reg. 27548 (July 3, 1990).

in this case underwent a number of changes, two of which are relevant to this decision. First, the rules now provide that a NPCP "will be sent to the president of the corporation or company charged with a violation." See, 55 Fed. Reg. 27557 and 27574 (July 3, 1990) (to be codified at 14 C.F.R. §13.16(d)). And second, the rules no longer provide that a respondent's failure to timely respond to a NPCP will result in the immediate issuance of an Order Assessing Civil Penalty without a hearing. Under the new rules, the failure to timely respond to a NPCP results only in the issuance of a document titled "Final Notice of Proposed Civil Penalty," after which the respondent still has an opportunity to request a hearing. See, 55 Fed. Reg. 27558-59 and 27574 (to be codified at 14 C.F.R. §13.16(e)).

It is clear that, under the new rules, an Order Assessing Civil Penalty would not have been issued following Respondent's untimely response to the NPCP. Further, although it is impossible to say for certain whether the response to the NPCP would have been timely if it had been directed to a specific individual such as Respondent's president (as the rules now require), I believe Respondent should be given the benefit of the new rules on this point. Accordingly, I have determined that the Order Assessing Civil Penalty shall be withdrawn. If the agency attorney elects to re-initiate this case by the issuance of a new NPCP, the case shall be governed by the new initiation procedures and Rules of Practice (55 Fed. Reg. 27574 (July 3, 1990) (to be codified at 14 C.F.R. §13.16 and part 13, subpart G)).

THEREFORE, this case is remanded to the Office of Assistant Chief Counsel for the Western-Pacific Region for withdrawal of the Order Assessing Civil Penalty and further proceedings in accordance with this order.

A handwritten signature in cursive script, reading "James B. Busey". The signature is written in dark ink and is positioned above the printed name and title.

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 16th day of August, 1990.